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IN THE

Supreme Court of the United States

October Term 1952

No. 669

MATHILDA FIORIVANTI,
Petitioner,

vs.

QUIRINO FIORIVANTI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The questions presented by this petition are whether a tenancy by the entireties may be partitioned without statutory authority in the District of Columbia; whether petitioner by an agreement to share the proceeds and incomes of real estate owned by her as tenant by the entirety has not been deprived of her constitutional rights by the construction of such agreement to require the partition and sale of the property itself. The constitutional questions to be presented are: (a) the elimination of contract rights by the Lower Court without statutory authority; (b) by depriving the petitioner of her property without due process of law by judicial legislation by the Court contrary to the common law and without benefit of statute and contrary to statutory law; (c) the effect of the decision of the Court was to judicially legislate into effect a new law contrary to the decisions of the Courts of the District of Columbia during their entire history holding that a tenancy by entireties could not be partitioned and of the common law to the same effect.

STATEMENT

This case arose upon a complaint filed February 12, 1951, in the District Court of the United States for the District of Columbia requesting maintenance, accounting, and other relief under rights created by a contract dated March 13, 1944. The contract was attached to the complaint and is shown in full in the record, page 6A. The pertinent parts of such contract are as follows:

> "2. The said parties agree that all property and assets belonging to either of them shall be conveyed in such fashion as to result in a tenancy by the entireties and joint ownership in both.
>
> "3. The said parties agree that they will execute a joint irrevocable Will devising each to the other

all property owned by them or in which they have any interest at the time of their death.

"4. The husband agrees that he will designate the wife as irrevocable beneficiary on all insurance policies.

"5. In the event if, for any reason, the said parties shall have any temporary or other differences and shall be separated, temporarily or otherwise, *then said parties do agree that each shall share equally with the other one-half of all proceeds, incomes and other properties received by them.*" (Emphasis added.)

A motion for summary judgment was filed by the defendant husband on the counterclaim set forth in the record, page 15A, wherein the husband prayed that pursuant to the provisions of Paragraph 5 of said agreement that the jointly owned property be partitioned, sold and the proceeds divided between said parties, and that receivers be appointed for said purpose.

Upon hearing of such motion the District Court made the following ruling:

"ORDERED AND ADJUDGED AS FOLLOWS:

* * * *

"2. That the motion for summary judgment filed by the defendant Quirino Fiorivanti, on the grounds that Paragraph 5 of the agreement of the parties dated March 15, 1944, be construed to direct the partition and sale and equal division of the jointly owned real estate be and the same is hereby granted and, accordingly, the sale of the parcels of real estate jointly owned by said parties is hereby ordered.

* * * *"

It will be noted that the record shows that in prior litigation between the parties, which is res judicata, that the agreement aforesaid was held to be a "valid and binding contract between the parties." (See Paragraph 4 of the complaint, record, page 3A.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In granting a partition of real estate held as tenants by the entireties without statutory authority;

2. In holding that an agreement between husband and wife to share equally the proceeds and incomes of property in the event of any temporary or other differences intended a partition of the property itself and not a division of the proceeds and incomes;

3. By taking away the constitutional right of contract of petitioner;

4. By depriving petitioner of her property rights in violation of statute;

5. By determining the action below contrary to the probable decision in this Court in the present instance; and

6. That the Court of Appeals, by its decision in judicially legislating has created retroactive operation upon property acquired before such judicial legislation.

REASONS FOR GRANTING THE WRIT

1. The decision below is contrary to the statute and common law as determined in the District of Columbia during the entire history of the District of Columbia. It will be noted that the Court of Appeals, on October 16, 1951, determined the case of *Tendrich v. Tendrich*, at 193 Fed. (2d) 368, ... App. D. C. ....., which for the first time determined that a tenancy by the entireties could be partitioned where no final decree of divorce had been rendered. (Title 16, Sec. 409, 1950 D. C. Code dissolves tenancies by the entireties upon final decree of divorce

and allows apportionment.) In that case, the Court of Appeals stated, at page 369:

> "This Court has long held that when property is conveyed to spouses jointly they own it 'by entireties' and that it cannot be partitioned. *Settle v. Settle,* 1925, 56 App. D. C. 50, 8 Fed. (2d) 911, 43 A.L.R. 1079."
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> • • • •
>
> "The tenancy by entireties is essentially a joint tenancy, modified by the common law theory that husband and wife are one person. *Settle v. Settle, supra,* 56 App. D. C. at 51, 8 Fed. (2d) at 912. We think we should recognize the obvious fact that persons one of whom has divorced the other for cruelty, although the divorce is only a limited one, are not one person and that refusal to partition their property may inflict an undeserved burden on the plaintiff, confer an undeserved benefit on the defendant, and serve no useful purpose. The interest of society • • • requires that that fact be recognized, and our common law system does not require that its recognition await express legislative action but permits Court to deal with it by creating an exception to a rule that they have themselves made. In our opinion, a Court that grants a limited divorce for cruelty may in its discretion provide for partition or sale of property held 'by entireties.' "

At 166 A.L.R. 969 (970) the general rule is indicated that, unless authorized by statute, a tenancy by the entireties cannot be partitioned by judicial decree.

2. Paragraph 5 of the agreement of March 13, 1944, (R 6A) states that upon separation, temporary or otherwise, "then said parties agree that each *shall share equally with the other one-half of all proceeds, incomes and other properties received by them.*" (Emphasis added.)

The Lower Court annulled the clear agreement of the parties and instead divided the property itself, not the proceeds or incomes.

3. It is obvious that the clear annulment of the contractual agreement of the parties by the Lower Court without sanction of statute is a violation of the petitioner's constitutional right of contract.

4. The net result of eliminating the division of the proceeds and incomes of the properties referred to in the agreement deprived petitioner of her property rights. Title 16, Section 409 of the 1950 D. C. Code was enacted by Congress as the exception to the rule of tenancy by entireties where a final decree of divorce was granted. This changed the tenancy from that of entireties to one in common. Under such circumstances a right of partition was available. In the instant case, petitioner is deprived of her right to retain ownership in realty and is forced to sell and divide that which the law says is indivisible.

5. The Lower Court has decided in 1952 that a new theory of law enunciated in the *Tendrich case, supra*, should abrogate an agreement of the parties made in 1944 in reliance upon decisions of that Court since its inception, which followed the common law to the same effect since the beginning of American jurisprudence. It is submitted that if the legislature cannot enact retroactive legislation, then certainly the Courts cannot have any greater right to legislation by decision.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari should be granted.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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vs.

QUIRINO FIORAVANTI, *Respondent.*

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

The sole question involved in this case was the interpretation of a written contract between a husband and wife.

In March 1944, following domestic litigation, the parties agreed to reconcile their differences and with a "desire to do all things necessary in contemplation of a continuance of a happy married life" they signed an agreement whereby, among other adjustments, three parcels of real estate in the sole name of the husband and one parcel in the sole name of the wife were conveyed into the joint ownership of both as tenants by the entirety. Said contract contained an "escape clause" (paragraph 5) which provided:

> "In the event if for any reason the said parties shall have any temporary or other differences and

shall be separated, temporarily or otherwise, then said parties do agree that each shall share equally with the other one-half of all proceeds, incomes and other properties received by them". (Appendix 7A).

In the present litigation each party filed a motion for summary judgment asking the Court's interpretation of the meaning of their contract as to said real estate in the light of their subsequent separation.

The wife's counsel contended that the language of that paragraph meant only a division of income rather than a division of the jointly owned real estate itself. The husband's counsel contended that the language meant a division of the proceeds from the sale of said real estate as well as a division of the income therefrom and a like division of any subsequently acquired property, of which there was none.

The trial court, in the light of the language of the entire agreement and the factual admissions contained in the pleadings, construed the language of the agreement to mean that, in the event the parties separated, their jointly owned real estate should be sold and the proceeds divided.

The United States Court of Appeals for the District of Columbia, in a per curiam opinion, affirmed the judgment, stating that the trial court had *"correctly construed the agreement between the parties"*. (Italics supplied). (Appendix 19).

ARGUMENT

It is clear that this partition was ordered on the basis of the contractual agreement of the parties and not by virtue of any statutory authority to partition, or under the authority of the divorce statute relating to partition, since in this case neither an absolute or limited divorce

existed between the parties. Accordingly, no question is presented in this case as to whether a common law or statutory right exists in the District of Columbia for partition between tenants by the entirety, nor whether the divorce statute in said District authorizes such partition, and the decisions cited by petitioner have no application.

The right of parties to contract by agreement between themselves, as in this case, for a partition of their jointly owned real estate in certain contingencies, and the power of the Court to enforce said contracts, has never been disputed in the law, and the interpretation of their contract does not raise any Constitutional or important question that would warrant the exercise of this Court's discretionary jurisdiction. This Court has frequently declared that a decision by the highest Court of Appeals as to the law of that State will ordinarily be accepted and left undisturbed by the Supreme Court. No Federal question of substance is involved, nor any conflict of applicable decisions, nor any matter of general importance or substance relating to the construction or application of the Constitution.

Accordingly, it is respectfully submitted that the Petition herein for Writ of Certiorari be denied.

Respectfully submitted,

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ity roster at Ford's Louisville works, because of certain provisions in collective-bargaining agreements between Ford and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, petitioner in Case No. 194 (here called International). He contends that those provisions have violated his rights, and those of each member of his class, under the Selective Training and Service Act of 1940, as amended.[2] He contends also that International's acceptance of those provisions exceeded its authority as a collective-bargaining representative under the National Labor Relations Act, as amended.[3] He asks, accordingly, that the provisions be declared invalid insofar as they prejudice the seniority rights of members of his class, and that appropriate injunctive relief be granted against Ford and International. After answer, both sides asked for summary judgment.[4]

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[2] 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, 60 Stat. 341, 50 U. S. C. App. § 308.

[3] 49 Stat. 452, 61 Stat. 140, 65 Stat. 601, 29 U. S. C. (Supp. V) §§ 157–159.

[4] In No. 194, International also questions the jurisdiction of the District Court. International recognizes that one issue in the case is whether it engaged in an unfair labor practice when it agreed to the allowance of credit for pre-employment military service in computations of employment seniority. It then argues that the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. (Supp. V) § 160 (a), vests the initial jurisdiction over such an issue exclusively in the National Labor Relations Board. This question was not argued in the Court of Appeals nor mentioned in its opinion and, in view of our position on the merits, it is not discussed here. Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice. As to a somewhat comparable question considered in connection with the Railway Labor Act, see *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 204–207.

The District Court dismissed the action without opinion but said in its order that it was "of the opinion that the collective bargaining agreement expresses an honest desire for the protection of the interests of all members of the union and is not a device of hostility to veterans. The Court finds that said collective bargaining agreement sets up a seniority system which the Court deems not to be arbitrary, discriminatory or in any respect unlawful." The Court of Appeals for the Sixth Circuit reversed, one judge dissenting. 195 F. 2d 170. Ford and International filed separate petitions for certiorari seeking to review the same decision of the Court of Appeals. We granted both because of the widespread use of contractual provisions comparable to those before us, and because of the general importance of the issue in relation to collective bargaining. 344 U. S. 814.

The pleadings state that Huffman entered the employ of Ford September 23, 1943, was inducted into military service November 18, 1944, was discharged July 1, 1946, and, within 30 days, was reemployed by Ford with seniority dating from September 23, 1943, as provided by statute.[5] It does not appear whether the other members of his class are veterans but, like him, all have

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[5] "SEC. 8. . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate [of satisfactory completion of his period of training and service], (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service . . .

. . . . . .

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . . ." 54 Stat. 890, 58 Stat. 798, 50 U. S. C. App. § 308 (b)(B).

Respondent contended in the Court of Appeals that allowance of credit for pre-employment military service was invalid because it went beyond the credit prescribed by the Selective Training and Service Act of 1940. That argument was rejected unanimously. 195 F. 2d 170, 173. It has not been pressed here. There is nothing in that statute which prohibits allowing such a credit if the employer and employees agree to do so. The statutory rights of returning veterans are subject to changes in the conditions of their employment which have occurred in regular course during their absence in military service, where the changes are not hostile devices discriminating against veterans. *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521; and see *Trailmobile Co.* v. *Whirls*, 331 U. S. 40; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275. See also, *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, as to a veteran's seniority status more than one year after his reemployment.

On the other hand, the second objection raised by respondent was sustained by a majority of the members of the Court of Appeals. This objection was that the authority of International, as a certified bargaining representative, was limited by statute and was exceeded when International agreed to the provisions that are before us.

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military service July 1, 1943, without any prior employment, served honorably until discharged March 1, 1945, and, thereafter, has been employed continuously by Ford, including six months of satisfactory probationary employment. His seniority dates from July 1, 1943. By July 1, 1946, it totaled 36 months, including 20 months of pre-employment military service, and 16 of post-service company employment. However, except for the collective-bargaining agreements, Huffman would then have outranked such a veteran by about 17 months, although Huffman's military service totaled one month less, his employment by Ford two months less and his combined military service and company employment three months less than that of such a veteran.

The authority of every bargaining representative under the National Labor Relations Act, as amended, is stated in broad terms:

> "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of *collective bargaining or other mutual aid or protection* . . . .
>
> . . . . .
>
> "SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of *collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:* . . . ." (Emphasis supplied.) 61 Stat. 140, 143, 29 U. S. C. (Supp. V) §§ 157, 159 (a).

In the absence of limiting factors, the above purposes, including "mutual aid or protection" and "other conditions of employment," are broad enough to cover terms of seniority. The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute is recognized in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 198–199, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those mem-

bers, without hostility to any. *Id.*, at 198, 202–204; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210, 211; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768.

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. A bargaining representative, under the National Labor Relations Act, as amended, often is a labor organization but it is not essential that it be such. The employees represented often are members of the labor organization which represents them at the bargaining table, but it is not essential that they be such. The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. In the instant controversy, International represented, with certain exceptions not material here, all employees at the Louisville works, including both the veterans with, and those without, prior employment by Ford, as well as the employees having no military service. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation.

Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary. See, *e. g., Hartley* v. *Brotherhood of Clerks,* 283 Mich. 201, 277 N. W. 885; and see also, Williamson & Harris, Trends in Collective Bargaining (1945), 100–103.

The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility. We have held that a collective-bargaining representative is within its authority when, in the general interest of those it represents, it agrees to allow union chairmen certain advantages in the retention of their employment, even to the prejudice of veterans otherwise entitled to greater seniority. *Aeronautical Lodge* v. *Campbell, supra,* at 526–529.

The public policy and fairness inherent in crediting employees with time spent in military service in time of war or national emergency is so clear that Congress, in the Selective Training and Service Act of 1940, required some credit to be given for it in computing seniority both in governmental and in private employment. See note 5, *supra.* Congress there prescribed that employees who left their private civilian employment to enter military service should receive seniority credit for such military service, provided their prior civilian employment, however

brief, was bona fide and not on a temporary basis. There is little that justifies giving such a substantial benefit to a veteran with brief prior civilian employment that does not equally justify giving it to a veteran who was inducted into military service before having a chance to enter any civilian employment, or to a veteran who never worked for the particular employer who hired him after his return from military service. The respective values of all such veterans, as employees, are substantially the same. From the point of view of public policy and industrial stability, there is much to be said, especially in time of war or emergency, for allowing credit for all military service. Any other course adopts the doubtful policy of favoring those who stay out of military service over those who enter it.

The above considerations took concrete form in the Veterans' Preference Act of 1944 which added the requirement that credit for military service be given by every civilian federal agency, whether the military service preceded or followed civilian employment.[8] Apparently recognizing the countless variations in conditions affecting private employment, Congress, however, did not make credit for such pre-employment military service compulsory in private civilian employment. A little later, the Administrator of the Retraining and Reemployment Administration of the United States Department of Labor assembled a representative committee to recommend

[8] "SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: . . . ." 58 Stat. 390, 5 U. S. C. § 861.

principles to serve as guides to private employers in their employment of veterans and others.[9] Among 15 principles developed by that committee, and "wholeheartedly" endorsed by the Secretary of Labor, in 1946, were the following:

> "8. All veterans having reemployment rights under Federal statutes should be accorded these statutory rights *as a minimum*.
>
> . . . . . .
>
> "13. Newly hired veterans who have served a probationary period and qualified for employment should be allowed seniority credit, at least for purposes of job retention, equal to time spent in the armed services plus time spent in recuperation from service-connected injuries or disabilities either through hospitalization or vocational training." [10]

The provisions before us reflect such a policy.[11] It is not necessary to define here the limits to which a col-

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[9] This "Committee of Nine" consisted of representatives from the Business Advisory Council to the Secretary of Commerce, National Association of Manufacturers, U. S. Chamber of Commerce, American Federation of Labor, Congress of Industrial Organizations, Railway Labor Executives' Association, American Legion, Disabled American Veterans and Veterans of Foreign Wars.

[10] Reemployment of Veterans Under Collective Bargaining, United States Department of Labor, Bureau of Labor Statistics, October, 1947, Statement of Employment Principles dated October 7, 1946, App. D, pp. 46–48; and see Bulletin of Retraining and Reemployment Administration, United States Department of Labor, October 10, 1946, p. 5; Harbison, Seniority Problems During Demobilization and Reconversion, Industrial Relations Section, Department of Economics and Social Institutions, Princeton University (1944) 12–14.

[11] Collective Bargaining Provisions—Seniority, Bull. No. 908–11, United States Department of Labor, Bureau of Labor Statistics

lective-bargaining representative may go in accepting proposals to promote the long range social or economic welfare of those it represents. Nothing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard public policy and national security. Nor does anything in that Act compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees. *Aeronautical Lodge* v. *Campbell, supra,* at 526, and 528–529, n. 5. For examples of negotiated provisions protecting veterans from loss of seniority upon their return to private civilian employment, recognized by the National War Labor Board as coming within the proper scope of collective bargaining, in 1945, see, *In re American Can Co.*, 27 War Lab. Rep. 634, 28 War Lab. Rep. 764, and *In re Firestone Tire & Rubber Co.*, 24 War Lab. Rep. 322, 28 War Lab. Rep. 483. See also, Bureau of National Affairs, Inc., Collective Bargaining Contracts (1941), 369 *et seq.*

The provisions before us are within reasonable bounds of relevancy. They extended but slightly, during a

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(1949), quotes many seniority clauses as examples of those then in use and including many factors other than length of employment. Among those quoted is the following:

"61. *Veteran Not Previously Employed Given Seniority Credit for Time Spent in Armed Forces*

"Any veteran of World War II who has been discharged, other than dishonorably, from the armed forces of the United States and who immediately prior to his acceptance in the armed forces was not previously employed by [name of company] and who is employed by [name of company] within twelve (12) months after his discharge, provided it is his first place of employment after his discharge, shall take his place on the seniority list after completing the sixty (60) day trial period. His seniority shall be computed from the day of his acceptance into the armed forces. However, no veteran covered by this section shall have seniority prior to December 7, 1941." P. 13.

period of war and emergency, the acceptance of credits for military service under circumstances where comparable credit already was required, by statute, in favor of all who had been regularly employed by Ford before entering military service. These provisions conform to the recommendation of responsible Government officials and round out a statutory requirement which, unless so rounded out, produces discriminations of its own. A failure to adopt these provisions might have resulted in more friction among employees represented by International than did their adoption.

The several briefs of *amici curiae,* filed here by consent of all parties, demonstrate the widespread acceptance and relevance of the type of provisions before us.

We hold that International, as a collective-bargaining representative, had authority to accept these provisions. Accordingly, we find no ground sufficient to establish the invalidity of the provisions before us or to sustain an injunction against either petitioner. In accord: *Haynes* v. *United Chemical Workers,* 190 Tenn. 165, 228 S. W. 2d 101.

The judgment of the Court of Appeals which reversed that of the District Court therefore is reversed. The judgment of the District Court is affirmed and the cause is remanded to it.

Reversed and remanded.